



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MBOK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Sètonджи Roland Adjovi

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM
Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant is currently serving as a P-5, Regional Peace and Development Advisor with the United Nations Development Programme (UNDP). He is challenging the decision to terminate his continuing appointment (Contested Decision), which he submits was taken by the Field Personnel Division of the Department of Field Support (FPD/DFS) in relation to his service with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).
2. He filed an application on 13 March 2017 with the United Nations Dispute Tribunal (UNDT/the Tribunal).
3. The Respondent filed his reply to the application on 18 April 2017 in which he contests, *inter alia*, the receivability of the application.
4. In accordance with Order No. 123 (NBI/2017), the Applicant submitted his comments on the receivability of his application on 20 July 2017.

Facts

5. The Applicant entered into service with MONUSCO on 7 January 2003. On 11 July 2014, he was granted a fixed-term appointment as a Special Adviser from 1 July 2014 to 30 June 2015.
6. By an interoffice memorandum dated 4 August 2014, the Applicant informed the Chief Human Resources Officer (CHRO) of MONUSCO that he had accepted the position of Regional Peace and Development Advisor with UNDP and intended to “relinquish [his] current position in MONUSCO”.
7. MONUSCO informed UNDP on 15 August 2014 that it was unable to maintain a lien on the Applicant’s post as requested but that it would agree to his transfer.
8. On 11 September 2014, UNDP offered the Applicant a fixed-term appointment for one year as the Peace and Development Advisor in Nairobi.

9. The Applicant was granted a continuing appointment with the Secretariat of the United Nations effective 30 September 2014.

10. UNDP responded to MONUSCO on 30 September 2014 that a transfer would not be possible but that it would recruit the Applicant after his resignation from MONUSCO. UNDP sent this response to the Applicant on 1 October 2014 and on the same day, the Applicant wrote to UNDP for further clarification.

11. On 2 October 2014, UNDP replied to the Applicant that neither a secondment nor a transfer from MONUSCO would be possible in his case. The Applicant sought further clarification from UNDP on his contractual status on 6 October 2014.

12. UNDP provided further clarification to the Applicant on 10 October 2014 that since he was neither being transferred nor being seconded, his recruitment was being treated as an initial appointment. Hence his benefits and entitlements would not be carried over.

13. By an inter-office memorandum dated 17 October 2014, the MONUSCO CHRO informed the Applicant that due to his selection by UNDP to serve as the Peace and Development Advisor, his appointment with MONUSCO would be “curtailed effective 24 October 2014” and that his separation from MONUSCO would take effect on the same date. A personnel action form (PA) was initiated on 24 October 2014 indicating the Applicant’s separation from service with MONUSCO and reappointment with UNDP.

14. The Applicant accepted UNDP’s offer of a one year fixed-term appointment and signed a letter of appointment on 8 November 2014. His appointment became effective on 25 October 2014 with an expiry date of 24 October 2015.

15. On 27 April 2015, MONUSCO paid the Applicant USD17,302.58 for his unused annual leave.

16. On 25 October 2016, the Applicant wrote to FPD/DFS seeking advice on his continuing appointment.

17. On 31 October 2016, FPD/DFS responded to the Applicant that he did not have a right to return to the United Nations Secretariat on completion of his fixed-term appointment with UNDP because he had separated from service with MONUSCO to take up the appointment with UNDP. He was informed that he would have to reapply to the Secretariat as an external candidate.

18. The Applicant responded to FPD/DFS the same day stating that he: (i) never voluntarily relinquished his continuing appointment; (ii) never separated from MONUSCO; (iii) never resigned from MONUSCO; (iv) never received a repatriation grant; and (v) only moved laterally from MONUSCO to UNDP on 25 October 2015.

Respondent's submissions

19. The application is not receivable *rationae materiae* because the email of 31 October 2016 does not constitute an administrative decision. It merely reiterates a decision that was previously communicated to the Applicant on 17 October 2014.

20. Additionally, the application is not receivable *rationae temporis*. The Applicant knew in October 2014 that he had been separated from the Secretariat effective 24 October 2014. UNDP confirmed by emails dated 2 and 10 October 2014 that the Applicant was not being transferred or seconded to UNDP but that he was being reappointed. MONUSCO's 17 October 2014 memorandum stated that the Applicant's separation from the Secretariat would be effective on 24 October 2014. The Applicant had a duty to contest his separation within 60 days of the 17 October 2014 memorandum but he waited for two years before requesting management evaluation. The FPD email of 31 October 2016 did not reset the clock. Thus, the application is time-barred.

Applicant's submissions

21. The Applicant submits that his application is receivable because he submitted a timely request for management evaluation of the contested decision dated 31 October 2016 to MEU and a timely application to the Tribunal.

22. There was no decision in 2014 as asserted by the Respondent. The Applicant only received a decision when he queried his status vis-à-vis the Secretariat in October 2016.

23. The Respondent's reliance on the 17 October 2014 inter-office memorandum is misleading because this document is a standard letter sent to all staff who are moving without regard to their long-term contractual status. The Applicant asserts that this document does not acknowledge the fact that he holds a continuing appointment.

24. The evidence adduced by the Respondent in support of his position that the application is not receivable is from UNDP and not from MONUSCO or from the headquarters of the Respondent.

Considerations

25. The only question before the Tribunal at this juncture is whether the Application is receivable.

26. The Applicant contends that he is challenging an adverse decision by FPD/DFS regarding his continuing appointment that was communicated to him on 31 October 2016. The Respondent however asserts that the administrative decision was communicated to the Applicant on 17 October 2014.

Was the contested decision communicated to the Applicant on 17 October 2014 or 31 October 2016?

27. Between August and September 2014, UNDP and MONUSCO communicated as to the possibility of either placing the Applicant on secondment or transferring him but neither of these options proved to be viable thus it was concluded by UNDP that the only option left for the Applicant was resignation.

This was clearly spelled out in UNDP's inter-office memorandum of 30 September 2014, which was sent to the Applicant on 1 October 2014.

28. Upon receipt of the 30 September 2014 inter-office memorandum, the Applicant wrote to UNDP for clarification on 6 October 2014 as follows:

Dear K,

I don't know whether I do have a specific query. I just want to know whether this is consistent with the offer that I received. (so if neither a secondment nor a transfer applies, what applies?)

The understanding of MONUSCO and FPD is that somehow there will be a continuation career wise (steps/benefits/pension that I will carry out.. and that seems the case based on the offer that I have signed.). If that is the case, no problem.

Most grateful in that case to inform me about the next steps.

Here, MONUSCO is awaiting the said clarification to initiate my check out.

29. UNDP responded to the Applicant on 10 October 2014, in relevant part, as follows:

Dear [Applicant],

As advised earlier today this will not be a Transfer nor a Secondment, so benefits and entitlements will not be carried over (leave, mobility status, repatriation grant, etc).

Your appointment is thus treated as an initial appointment with UNDP (Rehire-Reappointment in Atlas/HCM/IMIS).

...

If you need anything else or have further queries, please let me know.

30. Although the Applicant is now arguing that the Respondent failed in his duty to fully explain to him what the career consequences would be if he took the fixed-term appointment with UNDP, the Tribunal finds that UNDP's response clearly explained the consequences to him. If he was still in doubt as to the impact his move would have on his continuing appointment, he could have further queried UNDP or FPD/DFS but he did not do so. He merely responded "noted" to UNDP and did not correspond further.

31. One week later, on 17 October 2014, MONUSCO sent the Applicant an inter-office memorandum that stated:

This is to inform you that following your selection by UNDP to serve with the Office of the Special Envoy for the Great Lakes in Nairobi as Peace and Development Advisor at the P-5 level, your appointment with MONUSCO will be curtailed effective 24 October 2014. Accordingly, your separation with MONUSCO will take effect on the same date.

In this connection, please contact the Check-In-Check-Out (CICO) Office at the Regional Services Centre Entebbe (RSCE) on ext. 198-xxxx as soon as possible, to enable them to initiate this process.

...

32. A separation PA was issued on 24 October 2014 indicating that the Applicant's appointment had been "curtailed" by MONUSCO effective 24 October 2014 and that he was to be reappointed by UNDP. He was then paid USD17,302.58 for his unused annual leave in April 2015.

33. The Applicant has not denied receiving the 17 October 2014 inter-office memorandum, the 24 October 2014 separation PA or the payment of USD USD17,302.58.

34. The Applicant then commenced travel from his duty station in the Democratic Republic of the Congo (DRC) to Nairobi, Kenya, on or about 24 October 2014 to assume his new position with UNDP on 25 October 2014. He signed a letter of appointment for a one year fixed-term appointment on 8 November 2014.

35. The Tribunal has reviewed the chronology of events and the documents in this case from every angle possible and is truly baffled by this application. A secondment would have allowed the Applicant to retain his rights of employment with MONUSCO.¹ However, it is apparent that as early as 1 October 2014, the Applicant was aware that a secondment to UNDP was not an option and that he would have to resign to take up the appointment with UNDP. Since secondment

¹ See Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances, dated 1 January 2012.

was not a possibility as of 1 October 2014, the Applicant knew or should have known that he would be severing his contractual relationship with MONUSCO, which is part of the Department of Peacekeeping Operations and the United Nations Secretariat, once he signed a letter of appointment with UNDP, which is a Programme that is separate and distinct from the United Nations Secretariat.²

36. The Tribunal will now review the correspondence between the Applicant and MONUSCO, which is the cornerstone of this application. With respect to the 17 October 2014 inter-office memorandum from the CHRO to the Applicant titled “Curtailed of your appointment”, the Applicant submits that:

The Administration relied on Annex 7 of the Application as an evidence of the decision made in October 2014. However that is quite misleading because the document produced in that Annex 7 is a standard letter sent to all staff moving from one mission of the UN to another without any regard to their long-term contractual status. Indeed, it does not mention anywhere the contractual status of the Applicant as a holder of a continuing appointment. It is limited to the appointment within MONUSCO and not within the UN Secretariat in general.

37. This submission by the Applicant can only be characterized as mischievous. The Tribunal is battling to understand how the Applicant can argue that the 17 October 2014 memorandum was a “standard letter sent to all staff [...]” when it is specifically addressed to him and refers to his selection by UNDP for the post of Peace and Development Advisor at the P-5 level. Obviously, a standard letter to all staff members would not have included this level of detail.

38. The Tribunal also does not accept the Applicant’s submission that he was not separated from service with MONUSCO when the record shows that he was. Firstly, he officially communicated his intention to “relinquish” his position with MONUSCO to the CHRO on 4 August 2014 upon his selection for the UNDP post. Secondly, UNDP informed MONUSCO that neither a secondment nor a transfer would be possible so it would recruit the Applicant after his resignation from MONUSCO. Thirdly, MONUSCO informed the Applicant of his separation on the basis that he had been selected for a position with UNDP. Lastly, the

² See the United Nations System Chart at http://www.un.org/en/aboutun/structure/pdfs/UN_System_Chart_30June2015.pdf.

Applicant took up a new appointment with UNDP and was paid USD17,302.58 by MONUSCO for his unused annual leave.

39. The Tribunal finds that the 17 October 2014 inter-office memorandum unambiguously informed the Applicant of MONUSCO's decision to end his appointment, which at this point was a continuing appointment, by separating him from service on 24 October 2014. The Tribunal holds that the 17 October 2014 inter-office memorandum was an administrative decision because it had a direct and adverse impact on the Applicant's contractual status³ and had direct legal consequences for him⁴.

40. After two years of service with UNDP, the Applicant was faced with the possibility of non-renewal of his fixed-term appointment so he finally decided to contact staff members of the United Nations Secretariat on 25 October 2016 about his continuing appointment.⁵

41. A Desk Officer with FPD/DFS responded to the Applicant on 31 October 2016 that he no longer had a continuing appointment because MONUSCO had separated him in 2014.

42. The Applicant deems this 31 October 2016 correspondence to be a challengeable administrative decision.

43. The principle governing the issue of whether a reiteration of a decision already made constitutes a new decision for the purposes of art 7.1(a) of the UNDT Rules of Procedure and article 8.1(d)(i) of the UNDT Statute was laid down in *Ryan* UNDT/2010/174. The Tribunal there said:

When a staff member has submitted requests to the Administration on several occasions, only the first decision of refusal is appealable, and this appeal must be lodged within the time limits which run from the moment of the first decision of refusal. Subsequent decisions of refusal by the Administration are merely confirmative decisions that cannot be appealed. It is only when the staff member's new request is accompanied by new circumstances that the Administration must review it and the ensuing decision

³ Reid 2014-UNAT-419.

⁴ *Tabara* 2010-UNAT-030; *Tintukasiri* 2015-UNAT-526; *Kazazi* 2015-UNAT-557.

⁵ Annex 11 of the application.

cannot be considered as a confirmative decision (see for example judgment No. 1301 (2006) of the former UN Administrative Tribunal, as well as judgment UNDT/2010/155, *Borg-Oliver*, by this Tribunal). In the case at hand, the Applicant does not mention any new circumstances subsequent to the decision of 16 October 2003 that could have obliged the Administration to take a new decision.

44. The Tribunal in *Bernadel* UNDT/2010/210 similarly held:

Reiterations of the same decision in response to a staff member's repeated requests to reconsider the matter do not reset the clock. Therefore, the Applicant's subsequent communications with the Administration seeking reconsideration of the decision do not render this application receivable. As the former UN Administrative Tribunal stated in Judgment No. 1211, *Muigai* (2005), para. III, "the Administration's response to [a] renewed request would not constitute a new administrative decision which would restart the counting of time" as "allowing for such a renewed request to restart the running of time would effectively negate any case from being time-barred, as a new letter to the Respondent would elicit a response which would then be considered a new administrative decision". In Judgment No. 1301, *Waiyaki* (2006), para. III, the UN Administrative Tribunal also drew a distinction between "simple reiteration—or even explanation—of an earlier decision from the making of an entirely new administrative decision".

45. The Tribunal finds that the FPD/DFS response of 31 October 2016 was a reiteration of the 17 October 2014 decision received by the Applicant. Thus, it is not an appealable administrative decision.

46. Consequently, the Tribunal holds that the contested decision was communicated to the Applicant on 17 October 2014.

Is the application receivable rationae temporis?

47. In accordance with staff rules 11.2(a) and 11.2(c), for an application to be receivable, the applicant must first submit a request for management evaluation within the applicable time limit, which is "60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

48. Article 8.1(c) of the UNDT Statute provides that an application shall be receivable if an applicant has previously submitted the requested administrative decision for management evaluation where required.

49. Additionally, pursuant to art. 8.3 of the UNDT Statute, “[t]he Dispute Tribunal shall not suspend or waive the deadlines for management evaluation”. Accordingly, the Tribunal cannot entertain an application if the underlying request for management evaluation is time-barred.⁶

50. Since this Tribunal has found that the 17 October 2014 inter-office memorandum was the administrative decision relating to the curtailment of the Applicant’s continuing appointment, the Applicant should have requested management evaluation on or before 16 December 2014. The Applicant however did not request for management evaluation until 3 January 2017.

51. The Tribunal holds that the application is time-barred because of the Applicant’s failure to file his application within the established time limits. The Tribunal also holds that the Applicant has failed to articulate any exceptional circumstances justifying the delay.

Conclusion

52. Not only is this application not receivable, the Tribunal considers it to be frivolous, vexatious and an abuse of process. Nonetheless, it will refrain from ordering costs against the Applicant and his counsel. Instead, the Tribunal will reiterate relevant portions of the observations it made in *Haydar* UNDT/2017/050:

68. [...], the Tribunal needs to reiterate here that it is committed to dealing with genuine applications that come to it with a view to granting necessary reliefs to wronged and diligent applicants.

69. It is expected at all times that all applicants, especially those who have legal representation, present their applications with a good degree of articulation and a high sense of responsibility. This Tribunal is properly set up by law and has legal parameters for the applications it entertains. It is therefore not the forum for

⁶ See *Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, and *Adjini et al.* 2011-UNAT-108.

presenting soap box speeches and for making vague and insubstantial claims.

70. This Tribunal is a court of law and therefore it is the duty of the Applicant's counsel to properly school himself/herself in the relevant laws, procedures and processes before approaching this Tribunal [...].

71. [...] Eight years after the Tribunal commenced its work; the teething stages for any counsel are over and this anything-goes trend is no longer acceptable and will no longer be condoned.

72. Applications that are filed by legal counsel must be well-articulated and disclose proper causes of action, in other words, they must disclose the administrative decisions for which the Tribunal's review are sought. They must duly comply with relevant legal conditions and the forms for bringing applications provided on the Tribunal's website. It is not expected that an applicant's pleadings should cite laws except in the portion where arguments or submissions are presented. Any supporting documentary evidence referred to and relied upon in applications and which are in the applicant's custody must be properly annexed.

73. It is mention-worthy that where an applicant has legal representation, this Tribunal will readily presume that there are no concerns about the said applicant's access to justice. It needs also to be emphasized that the bringing of shoddy and vexatious applications and the abuse of the Tribunal's processes will not only result in the offensive applications being struck out but may be met by other sanctions that the Tribunal deems appropriate in the circumstances.

Judgment

53. The Application is not receivable and is dismissed in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 24th day of July 2017

Entered in the Register on this 24th day of July 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi